No. 17591

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANLEY E. HENWOOD, RICHARD I. ROEMER, LEWIS M. POE, individually, as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE and as proxies of said Committee, JAMES V. ARMOGIDA, ROBERT G. BALLANCE, FRED A. BERSHARA, NATHANIEL R. DUMONT, JOE L. FOSS, WILLIAM D. LAWRY, ELMER M. LUTHER, JR., EDWARD H. McLAUGHLIN, CHARLES SODERSTROM, JOHN A. STEEL, CLARENCE L. SUMMERS, ROY L. WILLIAMS, LOUIS W. WULFEKUHLER, ALFRED T. ZODDA, individually and as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE, BERNARD F. GIRA and HERBERT J. PETERSEN,

Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,

Appellees.

Opening Brief of Appellants Bernard F. Gira and Herbert J. Petersen.

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TOPICAL INDEX

PAGE

VI.

TABLE OF AUTHORITIES CITED

PAGE

STATUTES

TEXTBOOKS PAGE

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Opening Brief of Appellants Bernard F. Gira and Herbert J. Petersen.

Jurisdictional Statement.

This is a proxy contest case. Appellee Securities and Exchange Commission (hereinafter referred to as SEC) filed a complaint in the United States District Court for the Southern District of California naming as defendants the appellants named in the caption and one Herman Yaras and Eugene Schaefer doing business as Schaefer and Company and Appellee United Industrial Corporation. The complaint charged that appellants Bernard F. Gira and Herbert J. Petersen had solicited proxies in violation of Securities and Exchange

Regulation 14a-9, 17 C. F. R. 20.14a-9 which had been adopted by appellee SEC pursuant to Sections 14(a) and 23(a) of the Securities and Exchange Act of 1934, 15 U. S. C. 78n(a) and 78w(a).

Jurisdiction of the trial court was based upon 15 U. S. C. 78u(e) and 15 U. S. C. 78u(f). Final judgment in the trial court was entered on October 17, 1961 and appellants filed their notice of appeal herein November 14, 1961. Jurisdiction of this court is based upon 18 U. S. C. Sections 1291 and 1294.

Statement of the Case.

The Questions Involved.

Question 1—The final judgment below enjoined appellants Gira and Petersen from soliciting proxies unless Gira and Petersen affirmatively stated the following:

> "Defendants Bernard F. Gira and Herbert J. Petersen were instrumental in initiating and organizing the UIC Stockholders' Protective Committee and in formulating on behalf of said committee a slate of directors for membership on the Board of Directors of UIC in opposition to the slate of directors formulated by the management of UIC."
>
> and
>
> "Defendants Bernard F. Gira and Herbert J. Petersen have participated with representatives of the Stockholders' Protective Committee and aided and abetted said committee and its representatives in conducting proxy solicitations in opposition to the management of UIC." [C. T. .....]

The rule of law upon which the court relied in entering this judgment was Conclusion of Law 2 which reads as follows:

> "The evidence convincingly establishes that Bernard F. Gira and Herbert J. Petersen have been 'participants' in the contest for control of United Industrial Corporation within the meaning of Rule 14a-11(b)(3) Regulation 14, 17 C.F.R. 240.14a-11(b)(3). The definition encompasses not only the acknowledged members of the Committee but all those who, even indirectly, initiate, direct, finance, or otherwise seek to advance the objectives of a Committee contending for control of a corporation." [C. T. .....]

Was the court's judgment contrary to law when the record below establishes:

1. The definition of "participant" applied by the court in examining the facts is not contained in Rule 14a-11(b)(3), as adopted, and is in fact contrary to that rule.

2. A showing of "participation" within the meaning of Rule 14a-11(b)(3), as adopted, required a showing of either membership in a proxy solicitation committee or the exercising of leadership in the organization, direction, or financing of such a proxy solicitation committee. The trial court found named individuals to be members of the stockholder protective committee, *excluding appellants Gira and Petersen.* The trial court *failed to find* that appellants Gira and Petersen exercised leadership in the organization, direction, or financing of the proxy committee.

3. If the findings actually made were intended to infer "membership" or that these appellants exercised leadership in the organizing, directing or financing of the Stockholders Protective Committee, then to that extent they were not supported by any substantial evidence, and were clearly erroneous.

Question 2—Insofar as Findings of Fact 6, 12, and 15 suggest an agreement or agreements between appellants, Gira and Petersen, and Brandlin to secretly, jointly organize a proxy solicitation committee, are such findings clearly erroneous when the undisputed evidence shows:

1. The only communications between Brandlin and appellants Gira and Petersen were to the direct effect that if Brandlin ever participated in a proxy contest involving UIC it would be with an independent committee, organized, directed, and financed independently of and with no commitments to appellants, Gira and Petersen.

2. The acts, as well as the words, of Brandlin and the members of the committee completely covered all aspects of organization, direction, and finance and were done independently of any direction or control of appellants, Gira or Petersen.

Question 3—Finding of Fact 24 entered by the court reads as follows:

"The Committee's proxy statement and its other three communications soliciting the proxies of stockholders of UIC have been mailed to some 15,000 shareholders. The Committee admits that its solicitations have been conducted through the mails

and instrumentalities of interstate commerce. As Gira and Petersen initiated the Committee and have participated, directly and indirectly in directing and advancing its objectives, the Committee's use of the jurisdictional facilities is attributable to them."

Is Finding 24 clearly erroneous when the undisputed and indisputable evidence shows that:

1. The Stockholders' Protective Committee was initiated by the law firm of Vaughan, Brandlin & Baggot through attorneys Joseph J. Brandlin and Richard I. Roemer on behalf of and with the individual members of the Stockholders' Protective Committee and that these persons exercised, in fact, all of the leadership in connection with the organization, direction, and financing of the Stockholders' Protective Committee including designation and recruitment of the slate of nominees for the Committee, conceiving, drafting, clearing, and mailing of all proxy literature and all of the financing of every step of the proxy contest.

Question 4—Was a mandatory injunction directing appellants, Gira and Petersen, to file corrected Schedules 14B "concerning their participation in the solicitation of proxies in respect of the common and preferred stock of UIC" contrary to law when the record established:

1. No findings of fact were made by the court as to the respects in which said Schedules 14B's were insufficient.

2. The Schedules 14B filed by appellants Gira and Petersen, with the caveat that they were not participants, were in compliance with the applicable rules and statutes.

Description of the Complaint and Final Judgment.

The complaint in this action filed by the Securities and Exchange Commission alleged in Count I thereof that appellants Gira and Petersen violated Rule 14a-9 of the Securities and Exchange Commission. That Rule provides:

> "No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material facts necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

The complaint alleged that appellants Gira and Petersen solicited proxies which were false and misleading in that these particular proxy solicitations *ommited* to make certain statements and *affirmatively made* other statements which made the proxy solicitations false and misleading. The particular solicitations against which the charge was laid consisted of four reports or letters identified as *Plaintiff SEC's Exhibit 13* and *Defendant Stockholders' Protective Committee Exhibit A*. These mailings were admittedly carried out by the Stockholders' Protective Committee, found by the trial court to consist of seventeen named individuals [Finding 4], other than appellants Gira and Petersen. A final

judgment was entered against appellants Gira and Petersen, only upon the grounds that, for reasons to be hereinafter discussed, the solicitations made by the Stockholders' Protective Committee were "imputable" to Gira and Petersen. [C. T. .....]

The four proxy solicitation letters affirmatively state that appellants Gira and Petersen gave certain specific assistance to the Stockholders' Protective Committee including a stockholders list and information about the United Industrial Corporation as well as detailed statements concerning any prior contact or familiarity by members of the Stockholders' Protective Committee with Gira and Petersen. These appellants testified as to all of these facts before the Securities and Exchange Commission in March 1961. [Pltf. Exs. 33, 34.]

The judgment below, as to appellants Gira and Petersen, requires that as a condition of "further solicitation" (which these appellants did not and do not desire to carry on) that appellants *state* that they were instrumental in initiating and organizing the Protective Committee and formulating a slate of directors for that Committee and that they participated with and aided and abetted proxy solicitations by the Committee. They are further *enjoined* from stating that they are neither members or are participating with the Protective Committee in soliciting proxies.

In addition, the Judgment directed, by a mandatory injunction of the trial court, that appellants correct Schedule 14B filed with the Securities and Exchange Commission in July 1961, and set forth additional but undesignated information "concerning their status as participants in the proxy controversy."

It is appellants contention that the statements required by the trial court's judgment to be made concerning appellants are not true and that the findings of fact, conclusions of law, and judgment which require such statements to be made are unsupported in fact and unsupportable in law. It is appellants contention that the Schedules 14B filed by them comply with the rules and that the findings, conclusions of law, and judgment to the contrary are unsupported in fact and unsupportable as a matter of law.

The Background in Which the Questions Are Raised.

In this proxy contest the attacks by both the Stockholders' Protective Committee and management upon each other created an issue involving appellants Gira and Petersen. The issue as stated by the Stockholders' Protective Committee was that present management, including Gira and Petersen, were responsible for certain adverse results in connection with United Industrial Corporation. The attack by management was that the Stockholders' Protective Committee was a "front" for appellants Gira and Petersen and that they alone had been responsible for the economic adversity of UIC.

Because this issue was raised even prior to the first release of any proxy solicitation material by either side, the Securities and Exchange Commission permitted extensive comments by both sides concerning appellants. The Commission also made its own investigation in March 1961.

From the outset it was stated to the Securities and Exchange Commission and to 15,000 stockholders that Messrs. Gira and Petersen had sought the advice of Mr.

Brandlin, later counsel for the Committee wherein Messrs. Gira and Petersen stated they were *not* interested in waging a proxy contest; that Gira and Petersen had made available to the firm of Vaughan, Brandlin & Baggot a stockholders list; that they had given information to one of the slate of nominees concerning United Industrial Corporation; and that another of the members of the Committee, Mr. Williams, was an uncle of Gira. The Stockholders' Protective Committee distributed literature to the stockholders which made reference to every possible contact within a period of many years that Messrs. Gira and Petersen had ever had with any of the members of the Committee.

From the outset it has been clear that these appellants have been used by both sides as political punching bags in a struggle for control, although management material has been much more violent. The solicitation material of management went so far as to attack the honesty and integrity of these appellants and management was sued for libel. [Gira and Petersen Ex. II.] It is in this context that both the history and the present status of this controversy must be examined. Appellants Gira and Petersen have at all times asserted their own honesty and integrity. They are owners collectively of 100,000 shares of the stock of United Industrial Corporation, having purchased much of that stock at its highest price and having retained the ownership of that stock throughout this controversy. Their life savings are embroiled here. They have the opinion that present management will not likely protect their investment.

The charges levelled by the Securities and Exchange Commission here are *not* that Gira and Petersen, or

the Stockholders' Protective Committee for that matter, failed to reveal the matters detailed above concerning contacts between them. The charges levelled by the Securities and Exchange Commission here are *not* that appellants Gira and Petersen have doubts concerning present management. *The charge is to the effect that these appellants secretly organized the Stockholders' Protective Committee and in substance still secretly control it.* These charges are the basis upon which the Securities and Exchange Commission seeks to "impute" to appellants Gira and Petersen the proxy solicitation material mailed by the Stockholders' Protective Committee: these charges are the basis upon which the Securities and Exchange Commission sought a judgment in this action *requiring,* in effect, that appellants *admit* their guilt; these charges form the basis upon which the Securities and Exchange Commission obtained a judgment below requiring appellant to amend their schedules 14B filed with the Securities and Exchange Commission, again admitting to the conclusions as seen by the Securities and Exchange Commission. It is these charges upon which the judgment now before this court is based which, it is submitted, these claims are completely without foundation.

The Manner in Which the Questions Are Raised.

At the trial below, at the end of SEC's evidence motions were made by all of the defendants to dismiss under F. R. C. P. 41(b). [C. T. .....] The motions were denied except as to defendant Herman Yaras. That defendant, the record established, had discussed with counsel for the Protective Committee a proxy contest; had sold to Richard I. Roemer, one of the attorneys for the Committee, 2,000 shares of UIC stock which

Roemer used in part to resell to members of the slate of the Stockholders' Protective Committee. Moreover, Yaras had sent Elmer N. Luther, Jr., who later became a member of the Stockholders' Protective Committee, to Brandlin. The court below granted the motion of Yaras to dismiss and found that these facts did not establish that Yaras was a "participant" within the meaning of 14a-11(b)(3) and did not constitute him "a solicitor of proxies" and did not permit the proxy solicitation of the Stockholders' Protective Committee to be "attributed" to him. [C. T. .....]

At the close of all the evidence, appellants renewed their Motions to Dismiss, which were denied; appellants objected to the Findings of Fact and Conclusions of Law, all of which objections were denied; appellants moved for a new trial and a new judgment under F. R. C. P. 59 and these motions were denied. [C. T. .....]

Specifications of Error.

The district court erred as a matter of law in entering the judgment appealed from and in denying appellants motions to dismiss and appellants motion for a new trial and for a new and different judgment because:

1. The court erroneously adopted and applied a rule of law that the acts of aid admitted by appellants and disclosed and known to the Securities and Exchange Commission and all of the stockholders constituted appellants "participants" within the meaning of Rule 14a-11(b)(3).

2. The court erroneously made no findings as to whether appellants exercised "leadership—initia-

tive" in organizing, directing, or financing the Stockholders' Protective Committee, which findings were essential to support any judgment under Rule 14a-11(b)(3).

3. To the extent that the findings actually entered can fairly be construed as a finding of "leadership—initiative" in organizing, directing, or financing the Stockholders' Protective Committee, there is no substantial evidence to support such findings.

4. Findings of Fact 6, 12, and 15 insofar as they find existence of agreements between appellants and Brandlin concerning a proxy contest are erroneous as a matter of law since there is no substantial evidence in the record to support them.

5. The following findings of fact in the respects indicated are erroneous as a matter of law for the reason that there is no substantial evidence to support them:

A. Findings 7 and 11 to the extent that it is stated therein that a stockholders list was surreptitiously removed or stolen.

B. Finding 17 to the effect that it states that Gira and Petersen *inspired* the formation of the Commitee.

C. Finding 18 to the extent that it suggests any relationship between the information given to Henwood by Gira and Petersen and Henwood becoming Chairman of the Committee.

D. Finding 19 to the extent that it is asserted that counsel for the Committee suggested a libel suit to Gira and Petersen.

E. Finding 20 to the extent that it states that Gira and Petersen took active roles as participants by reason of a letter sent to the SEC by counsel for Gira and Petersen but which letter was never sent to any shareholder.

F. Finding 21 to the extent that it characterizes a press release, plaintiff Exhibit 23, and to the extent it alleges that Gira and Petersen caused the press release to be "issued to the press."

G. Finding 22 to the extent that it alleges that Gira and Petersen were "true sponsors" of the Stockholders' Protective Committee and sought to supress their contacts with the Committee.

H. Finding of Fact 24 to the extent that it states that because "Gira and Petersen *initiated* the Committee, and have "participated directly and indirectly, in directing and advancing its objectives, the Committee's use of the jurisdictional facilities is attributable to them."

I. Findings on the affirmative defenses No. 2 to the extent that it states that Gira and Petersen "caused" a press release to be issued or intended to conduct a proxy contest behind a seemingly independent Committee.

6. Appellants hereby incorporate by reference the objections to the findings of fact made by the Stockholders' Protective Committee appellants at pages ..... through ..... of their brief as though fully set forth herein.

ARGUMENT.

I.

Additional Factual Background.

The statement of facts made by the Stockholders' Committee appellants in their brief, pages ..... to ....., accurately states the material facts in this matter and they are adopted herein so as to avoid unnecessary repetition in this brief. The following additional matters are set forth to supplement this statement of facts.

A. Gira and Petersen Leave UIC.

In 1960 United Industrial Corporation, a Delaware corporation, commenced doing business, having come into existence as a result of a merger of Topp Industries, Inc., a Delaware corporation, and United Industrial Corporation, a Michigan corporation. Bernard F. Gira, one of the appellants herein was a vice-president of Topp Industries, Inc., and had been a director and president of that corporation and its successor corporation since 1955. Appellant Herbert J. Petersen was one of the founders of Topp Industries, Inc. He had been a director of that corporation since 1951 and Executive Vice President since 1955. After the merger the company had a number of subsidiaries engaged in various aspects of the electronics business and other fields. [Deft. Gira and Petersen's Ex. LL, pp. 14 and 15.]

From January 1960 to January 1961, for many reasons, the stock of UIC declined from a high of $11. to a low of below $5.

By reason of the determination in late 1960 to recognize certain losses and to write-off research and development assets which, as of the end of 1960 no longer

had value, and by reason of the fact that such write-off was in the magnitude of $7,000,000., a substantial policy crises was created in UIC. At a meeting in early January 1961 appellants Gira and Petersen resigned. [C. T. .....]

The announcement of the write-off and the timing thereof caused the stock to be suspended by the New York Stock Exchange and other national exchanges and by the Securities and Exchange Commission. Immediately upon leaving UIC, Gira and Petersen learned of intentions on the part of some of new management, particularly one Bernard Fein, to institute litigation against them.

B. Brandlin's "Independent Committee" Statement.

Gira and Petersen consulted with Roemer and Brandlin concerning their problems in the corporation. Gira and Petersen expressly stated that they would not engage in a proxy contest with respect to United Industrial Corporation. [R. T. 229, 1247, 1272.] Brandlin expressly stated that if he ever took on a proxy contest involving UIC it would only be with a committee of outstanding and independent individuals and particularly independent of Gira and Petersen. [R. T. 1247, 1248, 1269-1273.]

C. Gira and Petersen Do Not Organize the Committee.

Brandlin and Roemer began and continued the organization of what became the Stockholders' Protective Committee by recruiting nominees for the slate and they were joined in this program of recruitment by one of their first choices, Mr. Henwood. [R. T. 234-235, 1340-1341.] While Summers had been told by Petersen that Vaughan, Brandlin & Baggot might need

a public relations man and Summers stated that this was his interest in the potential proxy contest, at a later date he joined the Committee as a member. [R. T. 1222-1223, 2112-2117, 2182.] The testimony was that *all* of the activities in the organization of the Committee were carried out entirely by attorneys Brandlin and Roemer with the help of Summers insofar as Dumont was concerned and Henwood insofar as Zodda was concerned. [R. T. 234-235, 1340-1341.] These activities, the record without any question established, were without the knowledge, consent, approval, or disapproval requested or obtained of Gira or Petersen. [R. T. 321, 323, 339.]

D. Gira and Petersen Do Not Direct the Proxy Contest.

Thereafter the proxy contest which involved the activities of drafting proxy material, submitting it to the SEC, redrafting and mailing, all were carried out by the Committee and particularly Brandlin and Roemer. [R. T. 236.] Again no evidence was submitted or findings of fact submitted to the contrary.

When it was rumored that management was charging that the Committee was a "front" for Gira and Petersen, Brandlin, in a discussion with Gira and Petersen stated he would send a wire threatening action at such a charge and asked Gira and Petersen to do the same. [R. T. 1261-1263.] Gira and Petersen did not send such a wire or any wire.

After management's literature came out attacking the integrity of Gira and Petersen, their attorney Kendrick sent the SEC a letter that was being considered by Gira and Petersen as a method of fighting

back at the charges of misfeasance made by management. That letter was *not* sent to any stockholder. [R. T. 428, 467, 529.]

E. The Libel Suit.

Subsequently in July, Gira and Petersen filed a libel suit against management by reason of the direct charge of dishonesty made in a management mailing. A press release on this libel suit was independently prepared by a friend and public relations man, one Lewis, and was submitted to the SEC by Kendrick for approval. [R. T. 94, 95, 634, 469.] The only authority Lewis had to release the press release was upon approval by Kendrick, which approval was in turn conditioned on the approval of the SEC. [Pltf. SEC Ex. 25; R. T. 95, 631.] When the SEC disapproved the release and belatedly informed Kendrick of that disapproval, Kendrick contacted Lewis to direct him not to issue the release. However, contrary to prior express authority Lewis had permitted the release to be delivered to some news outlets. [Pltf. SEC Ex. 21; R. T. 631.] He testified that he "took a chance", contrary to express authority, upon his belief that the SEC would approve the release.

In fact,

(a) The release was stopped in Los Angeles except for one minor article in the "Examiner". [Pltf. SEC Ex. 25; Deft. Gira and Petersen Ex. HH.]

(b) The release in the form prepared never appeared, in any publication. [Pltf. SEC Ex. 19; Defts. Gira and Petersen's Exs. AA, BB, CC, DD, HH.]

(c) In the form in which *part* of the material appeared, it was aboslutely sterile and innocuous.

(d) The release was not charged to be false and misleading and was therefore not encompassed within the issues submitted by the complaint.

(e) The release was never found to be false and misleading and is therefore not an issue in this case.

The SEC upon the basis of the issuance of that release (without any proof that any stockholder had been solicited or affected by it in any way) demanded that Gira and Petersen file Schedules 14B presumably upon the grounds that by reason of that act Gira and Petersen fell under 14a-11(b)(6) [not 14a-11(b)(3)] as of the time of the release. Gira and Petersen under protest filed such Schedules 14B. [Deft. Gira and Petersens' Ex. FF.] They contained a statement concerning the press release which, under Rule 14a-11(b)-(6), was all that was required.

On July 21, 1961 the complaint herein was filed by the Securities and Exchange Commission which charged appellants and others with violating Rule 14a-9.

II.

Findings of Fact Which Are Clearly Erroneous Cannot Support a Judgment Under Rule 52 of the Federal Rules of Civil Procedure. Moreover Rule 52 Has No Application Where the Law Applied Is Incorrect.

The rules of law applicable to appellate examination of findings by a trial court cannot be in dispute. Rule 52(a) provides that they may not be reversed unless they are clearly erroneous. The corollary is that if findings are clearly erroneous they cannot be used to support a judgment. However, it is established law both in courts of appeal and in the United States Supreme Court that where the question is whether the district court applied the *proper standard* the rejection of findings is a question of law and Rule 52(a) has no application.

United States v. Parke Davis & Company, 362 U. S. 29, 80 S. Ct. 503 (1960);

Interstate Circuit v. United States, 306 U. S. 208, 59 S. Ct. 467;

United States v. John J. Felin & Company, 334 U. S. 624, 68 S. Ct. 1238;

Great Atlantic and Pacific Tea Company v. Supermarket Equipment Corporation, 340 U. S. 147, 71 S. Ct. 127.

As Justice Frankfurter stated in *Baumgartner v. United States,* 322 U. S. 665, 64 S. Ct. 1241, "the conclusiveness of a finding of fact depends on the nature of the materials on which a finding is based.

The finding even of a so-called 'subidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here."

See also:

Chandler v. United States, 226 F. 2d 403;

Sears, Roebuck & Company v. Johnson, 219 F. 2d 590;

Hunter Douglas Corporation v. Lando Products, 215 F. 2d 372 (C. C. A. 9, 1954);

Irish v. United States, 225 F. 2d 3 (C. C. A. 9 1955).

III.

The Conclusion of Law Below Finding Appellants, Gira and Petersen, to Be "Participants" Within the Meaning of Rule 14a-11(b)(3) of Regulation 14 Is Erroneous Because (1) It Is Based Upon the Application of Erroneous Standards, (2) There Are No Express Findings to Support It, and (3) the Indirect Findings Relating to the Issue Are Unsupported by the Evidence and Are Clearly Erroneous.

The Court below entered the following Conclusion of Law No. 2:

"The evidence convincingly establishes that Bernard F. Gira and Herbert J. Petersen have been 'participants' in the contest for control of United Industrial Corporation within the meaning of Rule 14a-11(b)(3) of Regulation 14, 17 C.F.R. 240.

14a-11(b)(3).[7] The definition encompasses not only the acknowledged members of a committee, but all those who, even indirectly, initiate, direct, finance or otherwise seek to advance the objectives of a Committee contending for control of a corporation."

Rule 14a-11(b)(3), to which Conclusion of Law 2 refers, reads as follows:

> "(b) *PARTICIPANT OR PARTICIPANT IN A SOLICITATION.* For purposes of this rule the term 'participant' and 'participant in a solicitation' include the following:
>
> . . . (3) Any Committee or group which solicits proxies, any member of such Committee or group and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly, take the initiative in organizing, directing or financing any such Committee or group."

Parenthetically, it should be noted that the Court's Conclusion of Law is based expressly upon Rule 14a-11(b)(3) and no other provision of 14a-11. Thus, for example, the Court did *not* conclude that Gira and Petersen were participants under 14a-11(b)(4), (5) or (6). Thus, the Court did *not* conclude that Gira or Petersen solicited proxies (14a-11(b)(6)). Thus, the Court did *not* conclude that Gira and Petersen had lent money or entered into any arrangement or understanding with another participant for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the Issuer by the participant or any other person (14a-11(b)(6)). The

Court did *not* conclude that Gira and Petersen had financed or joined with another to finance the solicitation of proxies (14a-11(b)(4)).

It is immediately apparent that the second sentence of Conclusion of Law 2, "is" without any warrant in the language of the Rule itself, distorts what the Rule says and expands the Rule's application far outside its boundary lines as written.

> (a) The words "or otherwise seek to advance the objections of a committee contending for control of a corporation" simply is not in the Rule at all.
>
> (b) The words "initiate, direct, or finance" in the court's language is, in the Rule itself "takes the initiative in organizing, directing, or financing."

It can immediately be seen that the rule as written excludes from the definition of the term participant, and as we shall show deliberately, those who aid, assist, advise or recommend in connection with a proxy contest. Moreover, "the initiative in organizing, directing, or financing" has reference to a finite group of those who exercise leadership in these activities. The emphasis is on those who take leadership action in the organizational activities or the activities of directing or financing the proxy contest.

The significance of the trial court's erroneous expansion of 14a-11(b)(3) is crucial in this case because if the rule had been applied as written the court must necessarily have found that the kind of assistance which appellants Gira and Petersen in fact gave could not make them participants in a proxy contest.

A. Gira and Petersen Were Not "Members" of the Stockholders' Protective Committee Within the Meaning of 14a-11(b)(3).

An analysis of the Conclusions of Law and Findings of Fact seem to concede that neither Gira nor Petersen were found to be "members of the Stockholders' Protective Committee" and thereby "participants" within that portion of Rule 14a-11(b)(3).

Finding of Fact 4 states that United Industrial Corporation Stockholders' Protective Committee is an association composed of seventeen named individuals and neither Gira nor Petersen are among the members named in that Finding of Fact.

Finding 22 which states that "Brandlin and Roemer have met with Gira and Petersen on many more occasions than they have met with members of the Committee" also supports this conclusion. The same result is evidenced by Conclusion of Law No. 3.

Virtually all of the seventeen (17) admitted members of the Committee testified at the trial, either directly or by deposition, and every one of them testified that they had no agreements with Gira or Petersen. [R. T. .....]

Although the term "membership" is not defined in the Proxy Rules the definition of analogous and corollary terms, as applied to group relationships, has long been established by the Supreme Court. Thus, the Supreme Court in *Bridges v. Wixon*, 326 U. S. 135, 65 S. Ct. 1443, accepted with approval the following explanation of the term "affiliation", admittedly a term indicating weaker ties than the term "membership":

> ". . . 'In the corporate field its use embraces not the casual affinity of an occasional similarity

of objective, but ties and connections that, though less than that complete control which parent possesses over subsidiary, are nevertheless sufficient to create a continuing relationship that embraces both units within the concept of a system. In the field of eleemosynary and political organization the same basic idea prevails.' . . . 'Persons engaged in bitter industrial struggles tend to seek help and assistance from every available source. *But the intermittent solicitation and acceptance of such help must be shown to have ripened into those bonds of mutual cooperation and alliance that entail continuing reciprocal duties and responsibilities before they can be deemed to come within the statutory requirement of affiliation. . . .*" Emphasis supplied.)

As the court later commented in *Bridges v. Wixon, supra,* affiliation imports "less than membership but more than sympathy." The key distinction is agreement by all parties and performance of the duties required by all parties. Thus, in *Fisher v. United States,* 231 F. 2d 99, at 107, the court said "membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization." In this case, the evidence established that neither Gira nor Petersen desired or requested to be a member of the Stockholders' Protective Committee and that the seventeen individuals named as members did not and would not agree to accept Gira and Petersen as members. Certainly the testimony established that all of the duties of membership and particularly financing were carried on by those persons found by the court to be members and no one else.

We are, of course, not referring at this point to such advocate's labels as are represented by phrases like "not openly participants in the contest" [Finding 12]; "inspiring the formation" [Finding 17]; "closely related to the Committee" [Finding 19]; "true sponsors of the Committee's objectives" [Conclusion of Law 3]; and "defacto participation". [Conclusion of Law 3.] These adjectives, it is apparent, are deliberately short of the "Proxy Committee Membership" requirement and their use is therefore not inconsistent with what we believe to be a conceded fact—that the Securities and Exchange Commission did not contend nor did the Court find Gira or Petersen to be members of the Stockholders' Protective Committee under Rule 14a-11(b)(3).

B. Gira or Petersen Did Not Take Organizing, Directing or Financing Initiative With Respect to the Committee.

The remaining portion of Rule 14a-11(b)(3) which should be considered is what we will term here the "organizing initiative" provision of that Rule. Thus, although one is not a *member* of a Proxy Solicitation Committee, one may still be a participant because this rule also applies to "any person whether or not named as a member who, acting alone or with one or more other persons, *directly or indirectly, takes the initiative in organizing, directing or financing any such Committee or group.*" (Emphasis supplied.)

It is significant to note that the Securities and Exchange Commission *did not* propose and the trial court *did not* enter a finding that Gira or Petersen did "directly or indirectly take the initiative in organizing, directing or financing" the Stockholders' Protective

Committee. One finds the descriptive, but off point language, such as "closely related" [Finding 19]; "true sponsors" [Finding 22]; "instigated and inspired" [Conclusion of Law 3]; and "defacto participation" [Conclusion of Law 3], but never the simple direct fact as laid down by the rule.

The closest language, but still far off mark, is in the form of an introductory phrase to Finding of Fact 24. That entire Finding of Fact reads as follows:

> "The Committee's proxy statement and its other three communications soliciting the proxies of stockholders of UIC have been mailed to some 15,000 shareholders. The Committee admits that its solicitations have been conducted through the mails and instrumentalities of interstate commerce. *As Gira and Petersen initiated the Committee and have participated directly and indirectly in directing and advancing its objectives, the Committee's use of the jurisdictional facilities is attributable to them.*"

As a matter of legal clarity it is perfectly apparent that "initiating a committee" is substantially different than "taking the initiative in organizing a committee." Again, "directing and advancing its objectives" is a substantially different matter than "taking the initiative in directing or financing a committee." The language of the rules requires a showing of primary leadership in those activities which have to do with organizing, directing, or financing a committee. The difference is significant as will be hereinafter shown.

1. The record in this case shows that Gira and Petersen gave to the attorneys for the Stockholders'

Protective Committee a stockholders list which was ultimately used by the Committee to solicit proxies; Gira and Petersen met with Mr. Henwood, the subsequent Chairman of the Committee and gave him information about the financial history and prospects of United Industrial Corporation; a public relations employee, Summers, was referred to counsel for the Committee by Petersen and that this employee later became a member of the Committee; Williams, a complaining stockholder and Gira's uncle, talked with Gira about Williams' complaint as to his shares and that Gira told him that Mr. Roemer of the firm of Vaughan, Brandlin & Baggot was investigating the matter. Thus, the record could support a finding as to this kind and extent of aid to the Committee. If Rule 14a-11(b)(3) said that one is a participant "if one aids or assists a proxy committee in any manner", the record would be material at this point but the rule does not so provide. (This is one of the basic errors in Conclusion of Law 2 adopted and employed by the court.) [C. T. .....]

2. In fact, Rule 14a-11(b(3) by its terms, supports the proposition that one may aid, assist, support, counsel, advise, sponsor, advance objectives, instigate or inspire a proxy soliciting Committee and one is not a participant—unless all of the facts show "organizing-initiative, directing-initiative or financing-initiative." Presumably this is the reason that such oblique language was used by the Securities and Exchange Commission in its proposed and adopted Findings. The facts in the record do not support the *required* factual showing. Substituted adjectives which suggest corollary but distinguishable standards do not cure the defect.

3. The statutory and administrative history of Rule 14a-11(b)(3) overwhelmingly supports the proposition that organizing, directing or financing initiative required by that Rule must be evidenced by leadership in these activities. To sustain a finding of initiative in organization, it must be shown *that Gira and Petersen undertook to establish the Committee as fully able to accomplish its purposes.*

Rule 14a-11 was adopted on January 26, 1956 (17 C. F. R. 240.14a-11). This rule is the so-called proxy contest rule, that is it is applicable only when there is opposition in a contest to obtain proxies. Before its adoption, in *any* proxy solicitation the first informational document filed with the Commission and sent to the stockholders was the so-called "proxy statement," Schedule 14A, which was required by Rule 14a-3. In the pre-1956 proxy statement, Schedule 14A, Question 3b required that there be designated the "names of the person on whose behalf it (the proxy solicitation) is made" (see 17 C. F. R. 240.14a(3) 1949 edition).

When Rule 14a-11 was adopted the following changes, among others to be later discussed, were made:

1. The new Rule 14a-11 applied only to proxy *contests.*

2. There were still required to be filed and sent to the stockholders the "proxy statements," Schedule 14A, but in proxy contest Question 3b was changed, and renumbered to Item 3(b)(2), so that in that event the question to be answered was "state *by whom* the soliciation is made. . . ." Rule 14a-11, Schedule 14A (17 C. F. R. 240.14a-11. Schedule 14A).

As noted, this was a substitute for the prior requirement to state the "names of persons *on whose behalf the proxy solicitation was being made.*"

3. It was provided that a new form, 14B, was to be filed covering information concerning "participants," as that term was defined in Rule 14a-11. The deliberate and recognized purpose of all these changes was to narrow and more critically define the *persons* as to whom information was required, to *leaders and persons and groups primarily engaged in and responsible for the conduct of the proxy solicitations.* Thus, Chairman J. Sinclair Armstrong of the Securities and Exchange Commission issued the following statement at the time the rules were adopted:

> "The proxy rule revision as proposed for public comment in August applied to all proxy contests, including not only those for election of directors, but for other types of contested corporate action for which shareholders votes are required. The proposed revision called for more information in detail with respect to the background, interests and activities of the participants in the contest. In the proposal, as now modified, the rules would make most of the new provisions applicable only to contests for control of Management, that is, for election or removal of directors and not to other types of proxy contests.
>
> In addition the definition of a 'participant' in proxy contests has been more precisely defined and narrowed to apply only to *persons and groups primarily engaged in and responsible for the conduct of the proxy solicitation and not to persons only*

incidentally involved." (Emphasis supplied) (C.-C.H. Federal Securities Law Reporter, 52 to 56 Decisions, Paragraph 76,376.)

Professor Loss, in his major work "Securities Regulations" observes that disclosure is now required *"of persons who were leaders in the Committees formation although not technically members."* (Loss Securities Regulation Vol. II, p. 884, Note 119.)

Moreover, the requirement for active leadership is graphically demonstrated by the fact that even the chief executive officers of the Issuer are excluded from the definition of the term "participant," by virtue of their office alone. Thus, the President of a corporation or any other chief executive officer, engaged in a proxy contest, who would obviously be the chief source of information, guidance, advice, aid and assistance, *is not a participant.* When Rule 14a-11 was first proposed "an officer who designates or who is authorized to designate a nominee" was to be included in the term "participant"—*even this was eliminated by the final rule as adopted* (See 20 Fed. Register, p. 3657).

The derivation of the "initiative" provisions of Rule 14a-11(b)(3) may have been 17 C. F. R. 240.12b-2(O) which includes in the term "promoter" the following definition:

> "Any person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer."

Note that insofar as the "initiative" provisions of Rule 14a-11(b)(3) have a relationship to the "promoter" definition, the 14a-11(b)(3) definition is narrow-

er and less inclusive. It excludes those who take initiative "in founding" a group and includes only initiative "in organizing" a Committee or group. Moreover, the term used in Rule 14a-11(b)(3) is *"the initiative" while* the "promoter" definition in 17 C. F. R. 240.12b-2(O) would have included "any initiative." Here too, therefore, there is a restrictive tightening of the definition to make specific the requirement for active leadership in the organizational activities of the Committee.

In this very action the court recognized that even substantial aid and assistance does not constitute "participation." Thus, it was shown with respect to the defendant Herman Yaras that

1. He sent committee member Luther to Brandlin.

2. He discussed with Brandlin a proxy contest but Brandlin rejected Yaras' participation therein for various reasons.

3. He sold to committee member Roemer 2,000 shares of stock when it was not otherwise available, which Roemer used to resell to some of the nominees so that shareholder stakes would be established.

Yet on the record and at the end of plaintiff's case defendant Yaras was found to be *not* a participant, *not* a solicitor of proxies, and the activities of the Proxy Commiteee were not *"attributed"* to him. *Preliminary discussions which end in a refusal to permit a joint committee and, aid or assistance which is short of organizational initiative is not included in the confines of* Rule 14a-11(b)(3).

The common sense of this construction is consistent with the public purpose of the rule which, if it cannot be sensibly administered, is positively harmful to the administration of the Securities and Exchange Act. It should be recalled that Rule 14a-11 provides that *no solicitation* of proxies in a proxy contest may be made unless Schedules 14B are filed for every participant. If proxy contests are commenced and Schedules 14B are not filed for true participants, the solicitors are subject to *criminal penalties, civil injunction,* and possible *invalidation of proxies.* This risk, of course, is almost entirely upon dissenters, that is those who are seeking to upset entrenched management. If the designation "participant" is not carefully defined, and precisely administered, then the rule is a trap to destroy effective opposition.

Moreover, Schedule 14B demands and properly so, detailed exposure of many facts. Those who, directly or indirectly, take the initiative in organizing, directing, or financing a proxy committee can answer, and should properly be called upon to answer these questions. But the class of persons falling within the "aid and assistance catagories" will be so large as to make impossible the obtaining of 14B Schedules.

Commissioner Armstrong struck the proper balance when he stated that Schedule 14B statements were to be required *only* of persons and groups "primarily engaged in and responsible for the conduct of the proxy solicitation. . . ."

In the light of the foregoing it is clear that Gira and Petersen were not participants in the proxy contest within the provisions of 14a-11(b)(3).

IV.

If the Judgment Below Was Based on a Holding That Gira and Petersen "Indirectly," i.e., Secretly, Took the Initiative in Organizing, Directing, or Financing the Stockholders' Protective Committee Such a Holding Is Contrary to Law Because There Are No Findings of Fact to That Effect and Such Findings Are Unsupported by Evidence in the Record.

As has been demonstrated in discussion under Section II, *supra,* the actions of Gira and Petersen, as established by the record, could not support a holding that Gira or Petersen were "participants" within Rule 14a-11(b)(3). Did the trial court hold that Gira and Petersen *secretly* agreed with Brandlin that they would jointly take the initiative in organizing, directing, or financing a committee to solicit proxies in opposition to management?

Again the record does not expressly state this to be the holding and there is no substantial evidence to support such a finding. The complaint charges directly and unambiguously that Gira and Petersen made false and misleading proxy solicitations. There is no charge in Count I of the complaint, which is the only count directed against Gira and Petersen, that they agreed or conspired to solicit proxies or to organize a committee or to become participants in a proxy contest. There is no allegation in the complaint that these solicitations were false and misleading because Gira and Petersen had secretly agreed or conspired to become participants in a proxy contest.

There is no Conclusion of Law or Finding of Fact to this effect. Therefore, any judgment based upon such an unalleged and unadjudicated conclusion must fall.

Certainly Finding of Fact 6 does not state that Gira and Petersen entered into a secret agreement with Brandlin to jointly take the initiative in organizing a proxy committee and to keep secret Gira and Petersen's participation therein. But since the word "agree" and the word "assurance" appear in Finding of Fact 6 that finding and the evidence on the subject matter contained therein should be examined.

The following is a brief summary of that finding:

1. "It was agreed" that a proxy contest was one way to combat the expected UIC lawsuit (note no finding was made as to who "agreed" and the record established only that a proxy contest was mentioned by Brandlin).

2. Gira and Petersen "agreed" that they could not be "openly identified" with a proxy committee. (Note, no finding is made as to whether Gira and Petersen agreed with each other only or agreed with someone else.) The record establishes only that *no one* used the word or the idea that *secret membership* was in order.

3. That Gira and Petersen were "given assurances" that if "seemingly" independent stockholders and prominent nominees and a suitable public relations consultant could be arranged and a stockholders list obtained, they, Brandlin and Roemer, would undertake a proxy contest. (There was not one word of evidence that anyone assured anyone of anything.)

It should be recalled that at the time of these discussions Gira had a serious physical illness and both Petersen and Gira were emotionally upset by reason of the attacks of management. They believed and do now

believe in their own integrity with respect to their stewardship as officers of UIC. One member of the management group particularly involved in the attacks on Gira and Petersen was Bernard Fein, an old discredited hand at corporate raiding. [Pltf. Ex. 20.]

Having met with Brandlin to obtain advice as to their corporate interests, Brandlin mentioned the possibility of a proxy fight. Any lawyer would have mentioned that possibility. But Brandlin then stated, in sworn testimony, that he told Gira and Petersen that he would not represent them in a proxy contest. Gira and Petersen were advised by Brandlin that their only defense to the impending charge by management was to defend when the charges were made and the threatened litigation by management commenced.

But a successful proxy contest involving UIC was evident so that any blind man could see it. The dramatic drop in the price of the stock, the suspension of trading, the so-called write-down of assets in the amount of $7,000,000—any able lawyer would see the possibilities. Therefore, Brandlin told Gira and Petersen that if he, Brandlin, ever undertook a proxy contest involving UIC it would only be with an independdent slate, owing no obligation whatsoever to Gira or Petersen. Why would a lawyer make that kind of a statement, if he wanted the men listening to him to secretly agree or join in initiating the organization of a proxy committee.

This is the key logical discrepancy which, together with the total absence of any other evidence, belies even an argued finding of a secret agreement. Brandlin testified in so many words directly that he would accept no agreement with Gira or Petersen to organize a

proxy committee. Gira, Petersen, Brandlin, and Roemer all testified that there was no agreement. The slate of nominees testified that there was no agreement. The independence of this slate of nominees and the independence of Brandlin in running the contest with their help all demonstrate no agreement. The evidence is overwhelming on this point. Even self interest belies such a conclusion because an uncommitted slate of nominees would do nothing for Gira or Petersen.

Since indirect participation through a secret agreement was neither charged nor found nor could it be supported by the record, a judgment based upon such a holding is erroneous as a matter of law.

V.

Since Neither Gira nor Petersen Made or Participated in the Four Proxy Solicitations Which Were the Subject of the Suit Below and Were Not Members of or Organizers, Directors, or Financers of the Stockholders' Protective Committee, the Judgment of the Court Which Would Require Statement to the Contrary to Be Made Is in Error. Moreover the Committee's Use of the Jurisdictional Facilities Cannot Be Attributed to Gira or Petersen.

It follows from the arguments made, *supra,* that a judgment which would require Gira and Petersen or anyone to include in proxy solicitation material statements concerning the relationship of Gira and Petersen to the proxy contest which are untrue could not be justified under the law. Rule 14a-9 precludes only false and misleading facts.

Moreover the true contacts between Gira and Petersen and the Stockholders' Protective Committee as discussed earlier certainly would preclude any holding that the action of the Stockholders' Protective Committee is "attributable" to Gira or Petersen.

In the court below the SEC relied upon *Securities and Exchange Commission v. May,* 134 Fed. Supp. 247, affirmed 229 F. 2d 124. In that case it was held that an opposition committee violated Rule 14a-9 by withholding information concerning one Bernard Frankel. The court recited the following evidence concerning the hidden activities of Bernard Frankel.

> 1. Frankel discussed with a member of the committee the advisability of acquiring shares and as a result the member of the committee bought shares.
>
> 2. Frankel and the member of the committee jointly discussed with the officers of the issuer corporation the problems of management. He did this on numerous occasions over a period of three years.
>
> 3. A second member of the committee acquired shares in the issuer as a result of conversations with Frankel. That second member of the committee and Frankel conferred with the issuer concerning company business.
>
> 4. It was shown that Frankel also contacted another individual, who had contributed $5,000 to the committee and whom the court subsequently held was one of the soliciting group. This individual, one Weismann, conferred with the issuer's president and stated that Frankel was one of the dissident group.

5. Frankel interested another individual, one Becker in the contest. The court found that Becker through Frankel made a large number of contacts for the committee. Thereafter, following suggestions of Frankel, Becker himself contacted many individuals concerning the purchase of stock in the issuer to assist the committee in bringing about a change in management.

6. Frankel and another member of the committee decided the location of the committee's offices in New York.

7. The court held that Frankel "was at least as active and had as much to say as any of the other avowed committee members."

8. The court found that Frankel was a member of the group soliciting proxies.

No more dramatic demonstration of the unsoundness of the SEC's position in this case and the erroneous character of the judgment, findings of fact, and conclusions of law can be demonstrated than by reference to *SEC v. May, supra.* The key to the *May* case is the factual demonstration that the hidden member of the committee was "at least as active and had as much to say" as any of the admitted members of the committee. The *May* case was a true case of joint control in which Frankel participated. The control and the intent to control the committee is evidenced by the activities whereby shares are acquired, conferences are held with management, representations are made that Frankel is a member of the group, contacts are made by Frankel expressly on behalf of the group, the location of the committee's offices is decided by Frankel. All the indicia indicating control are present to evidence the true relationships.

But a case in which control of a committee was found with factual findings to support that finding is no support for a case in which *no control* is either *found* or *supported by the record.*

It should be noted that in the *May* case the court found that Frankel was a "member" of the soliciting group, while in this case the SEC was unwilling even to propose such a finding. The only finding entered was one that "attributed" the activities of the committee to Gira and Petersen upon basis which we have argued before were unsound.

Findings of Fact 7 and 11 Are Clearly Erroneous to the Extent That It Is Stated Therein That a Stockholders List Was Surreptitiously Removed or Stolen From UIC. There Is No Substantial Evidence in the Record to Support Such a Finding.

When the complaint was filed in this action, the SEC did not allege that any provision of the United States Code or any Rule of the Securities and Exchange Commission had been violated by reason of any alleged misappropriation of a stockholders list. Objection was made at the trial to the admissability of evidence as to such an issue since it was neither pleaded nor was it relevant or material to the issues raised by the complaint. The objections were sustained as to the appellant Stockholders' Committee but overruled as to Gira and Petersen, with one exception. [R. T. 54.] When one witness testified that Robert Gira (the brother of appellant Bernard F. Gira) had asked him to remove a copy of a stockholders list the objection

was overruled as to Petersen but not as to Bernard F. Gira. [R. T. 54.] This latter ruling was classical hearsay; no attempt was made by counsel for the SEC or the court to explain how an alleged statement made by a non-party to an interested party outside the presence of any party would be admissible against anyone. The same unrestrained disregard of the elementary rules of evidence was continued when the Securities and Exchange Commission proposed and the court signed a finding, Finding 11, which recited this hearsay evidence. The evidence should have been excluded.

With this evidence eliminated the rest of the testimony is nothing but speculation and conjecture. It was the SEC's burden to establish the facts concerning the stockholders list at the trial. The essence of Petersen's testimony was that a stockholders list was in his effects when he left the premises of UIC on January 14, 1961, which list was returned by Brandlin on January 29, 1961. [R. T. 60-76, 1250.] The only witness called by the SEC on this point was Donald Hanmer who testified that there were a number of stockholders lists on the premises and that a December 1960 list arrived on January 14, 1961. [R. T. 159, 160, 163, 187.] *The crucial point as to the number of lists on the UIC premises from and after January 14, 1961 was never established;* that is to say that it is perfectly consistent that a December 1960 list was on the premises and another December 1960 list was in Petersen's effects when all of his belongings were removed from the UIC premises on January 14, 1961.

Of course it is apparent that not one relevant inference or finding turns upon this question. The in-

formation contained in the stockholders list, *i.e.,* the names and addresses of stockholders of UIC cannot be appropriated or stolen by anyone. They belong to all the stockholders. The Delaware law, the UIC state of incorporation, like the general law makes it clear that any stockholder has a right to such information (Delaware Corporation Law, Section 219).

It follows from what has been said that a finding of "surreptitious removal" or "theft" is both immaterial and unsupported by the evidence and is therefore clearly erroneous.

VI.

The Mandatory Injunction Requiring Appellants Gira and Petersen to File Amended Schedules 14B Is Erroneous Because:

1. **No Specific Findings of Fact Were Entered Setting Forth the Extent to Which Said Schedule 14B Was Incomplete.**
2. **Under Rule 14a-11(b)(6) the Schedules 14B Actually Filed Were Completely Correct.**

There is not a single finding of fact or conclusion of law stating the respects in which Schedules 14B filed by Messrs. Gira and Petersen [Exs. 10 and 12] are incorrect or incomplete.

One can speculate that the intention may have been to find that

1. Appellants Gira and Petersen were secret participants or members of the Stockholders' Protective Committee, and

2. Appellants failed to set forth such an alleged secret participation or membership in Schedules 14B.

As heretofore argued, such a holding has no warrant in the evidence, findings of fact, or conclusions of law. A mandatory injunction may not require appellant to make statements which are not supported by the record.

It should be recalled that there was no allegation, finding of fact, conclusion of law, or judgment to the effect that appellants Gira and Petersen were "participants" within the meaning of Rule 14a-11(b)(6). This portion of the rule holds that a participant is "one who solicits proxies." However, it was contended at the trial and a finding of fact was made to the effect that a press release which announced the filing of a libel suit by appellants Gira and Petersen against the management of UIC in July of 1961 was a proxy solicitation. [See Pltf. Ex. 19.]

The record without dispute established that

1. The release was delivered without any authority of appellants Gira and Petersen and contrary to their express direction and therefore simply was not their act. [Pltf. SEC's Ex. 25; R. T. 95, and 631.]

2. The release in the form prepared never appeared, insofar as the evidence is concerned, in any publication. [Pltf. SEC's Ex. 19; Defts. Gira and Petersen's Exs. AA, BB, CC, DD, and HH.]

In the form in which part of the material appeared, it was absolutely sterile and innocuous.

Dispite this fact and out of an abundance of caution, plaintiffs Gira and Petersen filed Schedules 14B and set forth the facts concerning this press release. Since

there is no contention or finding the facts set forth concerning the manner in which the schedules are incomplete or incorrect the mandatory judgment directing appellants Gira and Petersen to correct said Schedules 14B are without any warrant in the law.

Conclusion.

It is respectfully submitted that the judgment below be reversed.

Respectfully submitted,

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APPENDIX "A".

Regulation 14(a)-9 Under the Securities and Exchange Act of 1934.

Rule 14a-9. False or Misleading Statements.

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

Note. The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

Regulation 14(a)-11 Under the Securities and Exchange Act of 1934.

Rule 14a-11. Special Provisions Applicable to Election Contests.

(a) Solicitations to which this rule applies.

This rule applies to any solicitation subject to this regulation by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders.

(b) Participant or Participant in a Solicitation.

For purposes of this rule the terms "participant" and "participant in a solicitation" include the following:

(1) the issuer;

(2) any director of the issuer, and any nominee for whose election as a director proxies are solicited;

(3) any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly, take the initiative in organizing, directing or financing any such committee or group;

(4) any person who finances or joins with another to finance the solicitation of proxies, except persons who contribute not more than $500 and who are not otherwise participants;

(5) any person who lends money or furnishes credit or enters into any other arrangements, pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the issuer

by any participant or other persons, in support of or in opposition to a participant; except that such terms do not include a bank, broker or dealer who, in the ordinary course of business, lends money or executes orders for the purchase or sale of securities and who is not otherwise a participant;

(6) any other person who solicits proxies: *Provided, however,* That such terms do not include (i) any person or organization retained or employed by a participant to solicit security holders, or any person who merely transmits proxy soliciting material or performs ministerial or clerical duties; (ii) any person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or financial adviser, and whose activities are limited to the performance of his duties in the course of such employment; (iii) any person regularly employed as an officer or employee of the issuer or any of its subsidiaries who is not otherwise a participant; or (iv) any officer or director of, or any person regularly employed by, any other participant, if such officer, director, or employee is not otherwise a participant.

(c) Filing of Information Required by Schedule 14B.

(1) No solicitation subject to this rule shall be made by any person other than the management of an issuer unless at least five business days prior thereto, or such shorter period as the Commission may authorize upon a showing of good cause therefor, there has been filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant

in such solicitation, a statement in duplicate containing the information specified by Schedule 14B.

(2) Within five business days after a solicitation subject to this rule is made by the management of an issuer, or such longer period as the Commission may authorize upon a showing of good cause therefor, there shall be filed, with the Commission and with each national securities exchange upon which any security of the issuer is listed and registered, by or on behalf of each participant in such solicitation, other than the issuer a statement in duplicate containing the information specified by Schedule 14B.

(3) If any solicitation on behalf of management or any other person has been made, or if proxy material is ready for distribution, prior to a solicitation subject to this rule in opposition thereto, a statement in duplicate containing the information specified in Schedule 14B shall be filed by or on behalf of each participant in such prior solicitation, other than the issuer, as soon as reasonably practicable after the commencement of the solicitation in opposition thereto, with the Commission and with each national securities exchange on which any security of the issuer is listed and registered.

(4) If, subsequent to the filing of the statements required by subparagraphs (1), (2), and (3) above, additional persons become participants in a solicitation subject to this rule, there shall be filed, with the Commission and each appropriate exchange, by or on behalf of each such person a statement in duplicate containing the information specified by Schedule 14B, within three business days after such person becomes a participant, or such longer period as the Commission may authorize upon a showing of good cause therefor.

(5) If any material change occurs in the facts reported in any statement filed by or on behalf of any participant, and appropriate amendment to such statement shall be filed promptly with the Commission and each appropriate exchange.

(6) Each statement and amendment thereto filed pursuant to this paragraph (c) shall be part of the official public files of the Commission and for purposes of this regulation shall be deemed a communication subject to the provisions of Rule 14a-9.

(d) Solicitations Prior to Furnishing Required Written Proxy Statement.

Notwithstanding the provisions of Rule 14a-3 (a), a solicitation subject to this rule may be made prior to furnishing security holders a written proxy statement containing the information specified in Schedule 14A with respect to such solicitation, *Provided* That—

(1) The statements required by paragraph (c) of this rule are filed by or on behalf of each participant in such solicitation.

(2) No form of proxy is furnished to security holders prior to the time the written proxy statement is required by Rule 14a-3 (a) is furnished to security holders: *Provided, however,* That this subparagraph (2) shall not apply where a proxy statement then meeting the requirements of Schedule 14A has been furnished to security holders.

(3) At least the information specified in Items 2 (a) and 3 (a) of the statement required by paragraph (c) to be filed by each participant, or an appropriate summary thereof, is included in each communication sent or given to security holders in connection with the solicitation.

(4) A written proxy statement containing the information specified in Schedule 14A with respect to a solicitation is set or given security holders at the earliest practicable date.

(e) Solicitations prior to furnishing required written proxy statement—Filing Requirements.

Three copies of any soliciting material proposed to be sent or given to security holders prior to the furnishing of the written proxy statement required by Rule 14a-3 (a) shall be filed with the Commission in preliminary form, at least five business days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period as the Commission may authorize upon a showing of good cause therefor.

(f) Application of this rule to Annual Report.

Notwithstanding the provisions of Rule 14a-3 (b) and (c), three copies of any portion of the annual report referred to in Rule 14a-3 (b) which comments upon or refers to any solicitation subject to this rule, or to any participant in any such solicitation, other than the solicitation by the management, shall be filed with the Commission as proxy material subject to this regulation. Such portion of the annual report shall be filed with the Commission in preliminary form at least five business days prior to the date copies of the report are first sent or given to security holders.

(g) Application of Rule 14a-6.

The provisions of paragraphs (c), (d), (e), (f) and (g) of Rule 14a-6 shall apply to the extent pertinent, to soliciting material subject to paragraphs (e) and (f) of this Rule 14a-11.

(h) Use of reprints or reproductions.

In any solicitation subject to this rule, solicitating material which includes, in whole or part, any reprints or reproductions of any previously published material shall:

(1) State the name of the author and publication, the date of prior publication, and identify any person who is quoted without being named in the previously published material.

(2) Except in the case of a public official document or statement, state whether or not the consent of the author and publication has been obtained to the use of the previously published material as proxy soliciting material.

(3) If any participant using the previously published material, or anyone on his behalf, paid, directly or indirectly, for the preparation or prior publication of the previously published material, or has made or proposes to make any payments or give any other consideration in connection with the publication or republication of such material, state the circumstances.

Section 26, Securities and Exchange Act of 1934.

Unlawful Representations

Section 26. No action or failure to act by the Commission or the Board of Governors of the Federal Reserve System, in the administration of this title shall be construed to mean that the particular authority has in any way passed upon the merits of, or given approval to, any security or any transaction or transactions therein, nor shall such action or failure to act with regard to any statement or report filed with or examined by such authority pursuant to this title or rules and regu-

lations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading. It shall be unlawful to make, or cause to be made, to any prospective purchaser or seller of a security any representation that any such action or failure to act by any such authority is to be so construed or has such effect.

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "B".

Judgment, Findings of Fact, and Conclusions.

JUDGMENT

This action came on for hearing before the Court as a trial on the merits between July 26, 1961, and September 22, 1961, and the Court having considered all the evidence and the arguments of counsel, and having entered a decree of dismissal as to the defendant Herman Yaras and a final decree by consent as to the defendant N. Eugene Shafer, d/b/a Shafer & Co., and having entered Findings of Fact and Conclusions of Law, as to the defendants United Industrial Corporation ("UIC") Stockholders' Protective Committee and the members thereof, and as to the defendants Bernard F. Gira and Herbert J. Petersen, to the effect that the Securities and Exchange Commission is entitled to a permanent injunction restraining and enjoining the defendants United Industrial Corporation Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe as members of and proxies for said Stockholders' Protective Committee, and Bernard F. Gira and Herbert J. Petersen from engaging in acts and practices in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a), and Rule 14a-9 of Regulation 14 thereunder, 17 C.F.R. 240.14a-9, in connection with the solicitation of proxies as to the common and preferred stock of UIC, and commanding the defendants Bernard F. Gira and Herbert J. Petersen to comply with Rule 14a-11 of Regulation 14, 17 C.F.R. 240.14a-11, and directing the defendant UIC to arrange for the further adjournment of the annual meeting of its stockholders for a sufficient length of time to allow for the resolicitation of proxies heretofore given to the

defendant Stockholders' Protective Committee, which proxies by the terms of this decree are invalidated, as demanded by the Securites and Exchange Commission, and it appearing that the Court has jurisdiction of the parties hereto and the subject matter hereof—

I.

IT IS ORDERED, ADJUDGED AND DECREED that the defendants United Industrial Corporation Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe, individually and as members of and proxies for said Stockholders' Protective Committee, all members, associates, substitutes, agents, employees and attorneys of said Stockholders' Protective Committee, and the defendants Bernard F. Gira and Herbert J. Petersen, their agents, employees, and attorneys, and all persons acting in conceit or participation with any of said defendants, be and they hereby are permanently restrained and enjoined from, directly or indirectly, making use of the mails or any means or instrumentality of interstate commerce or of any facility of any national securities exchange to solicit or to permit the use of their names to solicit any proxy in respect of the common or preferred stock of UIC, or otherwise soliciting any such proxy, by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which at the time and in the light of the circumstances under which it is made is false and misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading, or necessary to correct any statement in an earlier communication with respect to the

solicitation of a proxy which has been or has become false or misleading, including the following:

(i) omitting to state that the defendants Bernard F. Gira and Herbert J. Petersen were instrumental in initiating and organizing the UIC Stockholders' Protective Committee and in formulating on behalf of said Committee a slate of directors for membership on the board of directors of UIC in opposition to the slate of directors formulated by the management of UIC;

(ii) omitting to state that the defendants Bernard F. Gira and Herbert J. Petersen have participated with representatives of the Stockholders' Protective Committee and aided and abetted said Committee and its representatives in conducting proxy solicitations in opposition to the management of UIC;

(iii) stating that the defendants Bernard F. Gira and Herbert J. Petersen are not members of the Stockholders' Protective Committee;

(iv) stating that the defendants Bernard F. Gira and Herbert J. Petersen are not participating with the Stockholders' Protective Committee in soliciting proxies in opposition to the management of UIC;

(v) stating that the formation of the Stockholders' Protective Committee was initiated solely as a result of complaints of the defendants Elmer M. Luther, Jr. and Roy L. Williams;

(vi) stating that certain losses sustained by UIC and diminution of stockholders' equity occurred during the time that Bernard F. Fein was Chairman of the Executive Committee; or

voting any proxy of any stockholder of UIC now held by the defendants UIC Stockholders' Protective Committee, Stanley E. Henwood, Richard I. Roemer or Lewis M. Poe as proxies for said Committee, or any substitute for any such defendant, or voting any such proxy which is not received pursuant to a solicitation made subsequent to the entry of this decree, in accordance with Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a), and Regulation 14, 17 C.F.R. 240.14.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants Bernard F. Gira and Herbert J. Petersen shall and they hereby are commanded to comply with Rule 14a-11 of Regulation 14, 17 C.F.R. 240.14a-11, by filing with the Securities and Exchange Commission and with each national securities exchange upon which the common or preferred stock of United Industrial Corporation is registered a corrected statement in duplicate containing the information specified by Schedule 14B of Regulation 14, concerning their participation in the solicitation of proxies in respect of the common and preferred stock of UIC.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant United Industrial Corporation, its officers, directors, employees, and attorneys, and each of them, be and they hereby are restrained and enjoined from holding any meeting of stockholders of United Industrial Corporation, except for the purpose of adjournment, until November 21, 1961.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed, without prejudice, as to the defendants James V. Armogida, Robert G. Ballance, Fred A. Beshara, Nathaniel R. Dumont, Joe L. Foss, William David Lawry, Elmer M. Luther, Jr., Edward H. McLaughlin, Charles Soderstrom, John Autry Steel, Clarence L. Summers, Roy L. Williams, Louis W. Wulfekuhler and Alfred T. Zodda, individually and as members of the United Industrial Corporation Stockholders' Protective Committee.

II.

FINDINGS OF FACT

A. Summary of Facts

1. United Industrial Corporation is a Delaware corporation. The securities of UIC are widely distributed among some 15,000 shareholders. The common and preferred stocks of UIC are listed and registered on the New York Stock Exchange and the Pacific Coast Stock Exchange. Warrants for common stock are listed and registered on the American Stock Exchange and the Pacific Coast Stock Exchange. The warrants carry no voting rights.

2. UIC commenced operations in 1960 as the product of the merger between Topp Industries Corporation and United Industrial Corporation, a Michigan corporation. Gira and Petersen, who had been the principal executive officers of Topp Industries, became the president and executive vice-president, respectively, of UIC. They also served as members of the board of directors. Bernard F. Gira owns 58,000 shares of the common stock of UIC, 5,000 shares of preferred

and 52,000 warrants. Herbert J. Petersen owns 38,500 shares of common stock, 5,000 shares of preferred and 38,500 warrants.

3. Late in 1960, it became apparent to the board of directors that the assets of UIC would be subjected to write-downs and adjustments totaling approximately $7,000,000. One such adjustment would change a profit previously reported by Topp Industries into a substantial loss. The board of directors of UIC met on January 12, 13 and 14, 1961, to consider what action was necessary because of the impending write-downs and adjustments. In the course of these meetings Gira and Petersen resigned as officers and directors of UIC. On January 16, 1961, the New York Stock Exchange suspended trading in the securities of UIC. The Pacific Coast Stock Exchange also suspended trading in the securities. The SEC entered an order under Section 19a(4) of the Act, 15 U.S.C. Sec. 78s(a)(4), suspending trading in the securities. The effect of this order was to bar trading in the over-the-counter market as well as on the exchange.[3]

4. The United Industrial Corporation Stockholders' Protective Committee is an association composed of the defendants Stanley E. Henwood, Richard I. Roemer, Lewis M. Poe, James V. Armogida, Robert G. Ballance, Fred A. Beshara, Nathaniel R. Dumont, Joe L. Foss, William D. Lawry, Edward H. McLaughlin,

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[3]On September 22, 1961, the SEC removed its bar against trading after the management of UIC and the Committee had made announcements to the Court concerning their intentions with respect to buying or selling securities of UIC in the event trading was allowed. The action of the SEC allows trading only in the over-the-counter market. The exchange suspensions remain in effect.

Charles Soderstrom, John A. Steel, Clarence L. Summers, Louis W. Wulfekuhler, Alfred T. Zodda, Elmer M. Luther, Jr., and Roy L. Williams. With the exception of Williams and Luther, the members of the Committee comprise the slate of fifteen which the Committee seeks to have elected as directors of UIC. Henwood, Roemer and Poe are named as the proxies for the Committee. Henwood is the Committee's chairman.

5. Shortly before he resigned as an officer and director of UIC, Bernard F. Gira had been negotiating to retain Richard I. Roemer as counsel for UIC.[4] Roemer is a partner in the Los Angeles law firm of Vaughan, Brandlin & Baggot.[5] Shortly after he resigned, Gira conferred with Roemer and J. J. Brandlin, a senior partner of the firm. At this time he sought advice as to what action he and Petersen might take to combat litigation which they expected the management of UIC to institute against them arising out of the substantial write-downs in the assets of UIC, and the suspension of trading in UIC's securities.

6. Gira was joined by Petersen during subsequent conferences with Brandlin and Roemer. From the commencement of these conferences, it was agreed that one effective way of combating the charges of misfeasance which UIC's management intended to bring against

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[4]Roemer had been house counsel for U. S. Science, a subsidiary of UIC, from early 1959 until late in December, 1960. Robert Gira, who is Bernard F. Gira's brother, was president of U. S. Science. He and Roemer have been friends for many years.

[5]The firm name is now Vaughan, Brandlin, Baggot, Robinson & Roemer. The firm organized the Committee, and has served as its counsel throughout the proxy controversy. The firm has made substantial cash advances to defray the expenses of the Commitee, and has estimated its contingent fees for legal service, exclusive of litigation fees, at $75,000.

Gira and Petersen would be for them to regain control of UIC through a proxy contest.[6] But it was also apparent that Gira and Petersen would have little chance of success in a proxy contest in which they were identified as participants with an insurgent committee, for the reason that they were the principal officers and in managerial control when the events leading to the disastrous write-downs in UIC's assets occurred. Gira and Petersen agreed that they were not in a position to be openly identified with any group intending to conduct a proxy contest. They were given assurances, however, that Brandlin and Roemer would be willing to undertake a proxy contest if it could be arranged that other seemingly independent stockholders would urge that such a contest be undertaken, if a slate of individuals of prominence could be assembled for election to the board of directors, if the services of a suitable public relations consultant could be arranged, and if a list of UIC's stockholders could be secured for the use of the opposition group. These conversations occurred during two weeks of the time Gira and Petersen were ousted from the management of UIC. There was also some discussion of a stockholders' derivative suit by Gira and Petersen but that unrealistic suggestion was discarded at once.

7. It is uncontradicted in the record that after Brandlin and Roemer made it clear that a successful proxy contest could not be mounted without a current stockholders' list, Robert Gira, who remained as President of U. S. Science for a short time after his brother,

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[6]UIC has sued Gira and Petersen in Delaware for damages based on their asserted misconduct while they were officers and directors.

Bernard Gira, had resigned, asked an employee of UIC to "steal" the stockholders' list for him. A new stockholders' list as of December 30, 1960, had been delivered to UIC from New York on January 14, 1960. No duplicate of this list existed at this time. The employee refused to do so. Shortly thereafter, the list as of December 30, 1960, was removed surrepitiously from the executive offices of UIC, and was delivered late Friday, January 27, 1961, by Gira and Petersen to the offices of counsel for the Committee where a duplicate was made by the law firm at its own expense. Then, without advising the management of UIC that his firm had the list, Brandlin returned it to UIC's executive offices on Sunday afternoon, January 29, 1961. At the time the list was duplicated no stockholder of UIC other than Gira and Petersen had approached counsel for the Committee to discuss a proxy contest.

8. The stockholders' list was of the utmost value to counsel for the Committee in assembling a slate of candidates for election to the board of directors from among stockholders unfriendly to management, and in mailing out the proxy solicitation material disseminated after the Committee was organized.

9. Late in March, 1961, in the course of examining the Committee's preliminary proxy statement which became its first mailing to stockholders, Roemer was interrogated under oath by members of the SEC's staff and was asked, *inter alia,* to describe the circumstances under which the Committee came into possession of the UIC stockholders' list. Roemer testified that the list was turned over to Brandlin and himself by Bernard F. Gira during an evening conference at Gira's home in Malibu when the three first discussed a proxy con-

test. This was about ten days after Gira had resigned as president and a director of UIC. Roemer testified that he and Brandlin examined the list briefly, and that when the conference ended took the list with them. Roemer did not disclose to the SEC's staff that his law firm had duplicated the list, nor did he disclose the strange circumstances under which the list had been returned to UIC's offices on a Sunday afternoon. Rather, when asked who the list belonged to, Roemer stated he supposed it was Gira's. When asked why Gira had the list in his possession after he had resigned, Roemer testified that he did not know. At a later date Roemer attempted to correct this and similar testimony which he had given in the course of a deposition in *UIC v. Henwood* by sending a letter to the staff of the SEC to the effect that the stockholders' list had been delivered by Gira and Petersen to the law offices of counsel for the Committee, and that it had not been obtained at Gira's home in Malibu.

10. Gira and Peterson also were asked by the staff of the SEC to describe the circumstances under which they turned the list over to counsel for the Committee. Both Gira and Peterson testified that the list had been included among effects which they took with them on January 14, 1961, the day they resigned as directors of UIC. They testified that they delivered the list to counsel for the Committee on Friday, January 27, 1961.

11. The evidence establishes beyond question that, without the knowledge or consent of management, the stockholders' list was removed from the executive offices of UIC during the week ending January 28, 1961 (probably on Friday, January 27), delivered by Gira and Petersen to counsel for the Committee late Friday,

January 27, 1961, duplicated during the week-end, and returned on Sunday afternoon, January 29, 1961. Indeed, the record sustains the contention of the SEC that the stockholders' list was stolen.

12. It was also essential that counsel for the Committee represent, at least ostensibly, some stockholders of UIC before setting about to organize an insurgent Committee. It had already been decided that Gira and Petersen could not openly participate in the contest with the Committee and they could not be held out as clients of the law firm. Gira and Petersen then communicated with Roy L. Williams and Elmer M. Luther, Jr.

13. Roy L. Williams, an uncle of Bernard F. Gira, at one time had been employed by Gira as an employee of Topp Industries. As a holder of 400 shares of UIC stock, Williams became concerned about the suspension in trading and the fall in the market price of his stock. Gira suggested to Williams that he get in touch with Roemer. Williams, who was led to believe that Roemer was conducting an investigation into the situation, telephoned him and complained about his investment in UIC. Williams did not, however, authorize the bringing of a proxy contest in his behalf. He was merely seeking information concerning his investment.

14. Elmer M. Luther, Jr. previously had been an employee of UIC. His services were terminated in December 1960, shortly before Gira and Petersen resigned. Prior to his employment with UIC, Luther had been an employee of Topp Industries. As an owner of 250 shares of stock in UIC, he, like Williams, was concerned with the suspension of trading in the stock. He discussed the situation with Petersen

who suggested that he communicate with Roemer. Luther called Roemer and complained about the status of his investment in UIC, but did not authorize Roemer to initiate a proxy contest. Neither Luther nor Williams paid Vaughan, Brandlin and Baggot any retainer. Both of them, however, at Roemer's request, did sign Schedules 14B under Regulation 14 which he had prepared for them and which identified them as participants in the proxy contest. Notwithstanding this and even after it had been publicly announced that the Committee had been formed, Williams and Luther considered themselves neither members of the Committee nor clients of counsel for the Committee. Their telephone calls to Roemer were seized upon by counsel for the Committee as a mandate to organize an expensive proxy contest. The assertion in the Committee's proxy statement that counsel for the Committee started the organization of the Committee on behalf of Luther and Williams is seriously misleading.

15. Having supplied counsel for the Committee with the stockholders' list needed to organize and conduct a proxy contest, Gira and Petersen continued to aid in the formation of the Committee. To ascertain the distribution of the larger stockholdings, Gira and Petersen again met with counsel for the Committee to canvass the names on the list, and agree upon the approach to be made to stockholders with significant holdings.

16. Petersen sent Clarence L. Summers, who became a member of the Committee, to Brandlin. Summers also agreed to serve as public relations consultant to the Committee. Summers had served UIC as public relations consultant in the past. He also sought out

Nathaniel R. Dumont, who became a member of the Committee's slate.

17. Having inspired the formation of the Committee, Gira and Petersen continued to meet with Brandlin and Roemer to supply needed information, including a summary outlining the operations of UIC's subsidiaries and divisions, and confidential reports containing derogatory comments about members of the management.

18. Late in February, 1961, Gira and Petersen, Elwood S. Kendrick, who had been retained by them to defend the litigation brought by the management of UIC, Brandlin, Roemer and Stanley E. Henwood, who was than a potential member of the Committee, met to discuss the affairs of UIC. At this meeting, Gira and Petersen outlined the operations of UIC and its subsidiaries. Significantly, on the day after this meeting, Henwood became chairman of the Committee.

19. Gira, Petersen, Brandlin and Roemer met again in April, 1961, in Kendrick's law offices to decide what action they could take to counteract the charges in management's proxy material that Gira and Petersen were closely related to the Committee. Counsel for the Committee suggested that Gira and Petersen institute a libel suit against the management.

20. It was with events occurring in July, 1961, that Gira and Petersen assumed even more active roles as participants in the proxy contest, although they continued to disclaim participation. Early in July counsel for Gira and Petersen indicated to members of the staff of the SEC that in his opinion they had been libeled by statements in management's proxy material and that his clients intended to communicate with the

stockholders of UIC to deny the alleged defamatory statements. Shortly thereafter, a proposed letter addressed to stockholders by Gira was delivered to the SEC so that members of its staff could comment on it as solicitation material. This letter, although headed "THIS IS NOT A PROXY SOLICITATION," was unmistakably solicitation material. While the letter was never mailed to stockholders, it evidences the fact that Gira and Petersen were vitally interested in unseating the management slate.

21. On July 12, 1961, Gira and Petersen filed a $2,000,000 damage suit in the Superior Court of Los Angeles County alleging that the proxy material which management was circulating to the stockholders of UIC defamed them. A few hours before this suit was filed, counsel for Gira and Petersen telephoned the SEC's staff to seek advice in connection with an announcement which had been prepared for release to news services announcing the filing of the suit. This press release described not only the filing of the libel suit, but also included a discussion of the proxy contest and named each member of the Committee's slate. The staff was urged to "clear" the release in time to make the afternoon editions of certain newspapers on the East Coast. Although counsel was advised that such a release would constitute a "solicitation" within the definition of that term in Rule 14a-1 of Regulation 14, the statement, nevertheless, was issued to the press. The text of the release makes it evident that it was in fact intended to influence stockholders of UIC to vote their proxies for the Committee and in opposition to management. The libel suit was filed two weeks before the scheduled annual meeting of stockholders, and at about

the time that the Committee's fourth and last solicitation material was sent to stockholders.

22. The Committee has never actually functioned as an association; all of its members have never been assembled together at one time. Since its formation there has been only one meeting, and that one involved several, but not all, of the Committee's members. Brandlin and Roemer have met with Gira and Petersen on many more occasions than they have met with members of the Committee. The Committee is merely an imposing "letterhead" association, most of whose members were selected by and agreed to serve as an accommodation to counsel for the Committee. Many of them were not even stockholders of UIC until Roemer purchased 2,000 shares of the stock from Herman Yaras and distributed 1,000 shares among the non-stockholder members so they could appear to have an interest in the enterprise. Yaras had been financial consultant for UIC and was a close associate of Gira and Petersen. Such a seemingly independent group was necessary as Brandlin and Roemer knew that stockholder support would not be forthcoming if Gira and Petersen, the true sponsors of the Committee, participated openly as members.

23. The Committee's proxy material also was misleading in stating that certain losses sustained by UIC and diminution of stockholders' equity occurred where Bernard F. Fein was Chairman of the Executive Committee of UIC. Fein did not become Chairman of the Executive Committee until after Bernard F. Gira and Herbert J. Petersen had resigned. The Committee contends that by inadvertence the statement was not removed from one paragraph of the Com-

mittee's last mailing to stockholders although it was removed from other paragraphs, and that in any event it was not of great significance. The statement, however, was not so innocuous as the Committee suggests. In the context in which it was made it clearly implied, contrary to fact, that Fein, Gira and Petersen shared executive and managerial responsibility in UIC during the critical period in question.

24. The Committee's proxy statement and its other three communications soliciting the proxies of stockholders of UIC have been mailed to some 15,000 shareholders. The Committee admits that its solicitations have been conducted through the mails and instrumentalities of interstate commerce. As Gira and Petersen initiated the Committee, and have participated, directly and indirectly, in directing and advancing its objectives, the Committee's use of the jurisdictional facilities is attributable to them.

B. Affirmative Defenses

1. In addition to denying that Bernard F. Gira and Herbert J. Petersen were undisclosed sponsors of the UIC Stockholders' Protective Committee, the Committee interposed certain affirmative defenses to the SEC's action. The first such defense asserted by the Committee is that, in the course of the examination of its proxy material by the staff of the SEC, all material facts concerning Gira's and Petersen's connection with the Committee were disclosed to stockholders as early as April, 1961, when the Committee first began circulating its solicitation material. The Committee contends, therefore, that the SEC should be estopped from contending that the Committee's proxy material is false and misleading.

2. The Committee's assertion is contrary to the facts. Significant events establishing the close identification of Gira and Petersen with the Committee occurred subsequent to the time the Committee first began soliciting the proxies of stockholders. As recently as July, 1961, Gira and Petersen instituted the libel suit against management, and at the same time caused a press release designed to influence votes in the election contest to be issued. Other disclosures in the Committee's proxy material are wholly inadequate in the light of facts not known to the staff when the material was commented upon. For example, it was disclosed in the proxy material that Gira and Petersen had given the Committee a stockholders' list, but the circumstances under which the list was obtained and turned over to counsel for the Committee, which, as discussed above, are highly significant in evidencing the intention of Gira and Petersen to conduct a proxy contest behind the facade of a seemingly "independent" Committee, were not disclosed. Even if the facts were as the Committee contends this defense is legally insufficient because as against the SEC the doctrine of estoppel is not available. *N. Sims Organ & Co. v. SEC,* .....F. 2d..... (C. A. 2, 1961); *SEC v. Culpepper,* 270 F. 2d 241 (C. A. 2, 1959); *SEC v. Morgan, Lewis and Bookins,* 209 F. 2d 33 (C. A. 3, 1953); *SEC v. Torr,* 22 F. Supp. 602 (S.D.N.Y., 1938). See also Section 26 of the Securities Exchange Act, 15 U.S.C. 78z, which specifically provides that the failure of the SEC to act "with regard to any statement or report filed with or examined by such authority pursuant to this title or rules and regulations thereunder [may not] be deemed a finding by such authority that such statement or report is true and accurate on its

face or that it is not false or misleading." With respect to proxy solicitation material filed with the SEC, in addition to settled general principles, the statute makes it explicit that staff examination of solicitation material in no sense constitutes approval thereof, or bars a suit by the SEC to protect the public from further untrue or misleading solicitations.

3. The Committee misconstrues the effect of the examination of the Committee's preliminary proxy material by the staff of the SEC. The staff examines and, if necessary, comments upon all preliminary proxy statements and other communications intended for distribution to stockholders. This is an administrative procedure developed by the SEC to assist all contestants in a proxy controversy to comply with the proxy rules and to avoid untrue, misleading or exaggerated claims in their communications to stockholders. In nearly all proxy controversies the basic and essential facts are peculiarly within the knowledge of the contestants. It is the inescapable obligation of the contestants themselves to make certain that all material facts are set forth in their communications to stockholders in a straightforward and understandable manner. This obligation cannot be shifted to the SEC or to its staff. *C. Subin v. Goldsmith,* 224 F. (2d) 753 (C. A. 2, 1955), *certiorari denied* 350 U. S. 883.

4. The second affirmative defense asserted by the Committee is that the SEC should be denied relief in equity because in bringing this action to invalidate the Committee's proxies, the SEC comes before this Court with "unclean hands." The Committee has charged that the SEC's decision to institute this proceeding was unduly influenced by the management of UIC. The

record is barren of any evidence sustaining the accusation, and it is completely unwarranted. Indeed, in his summation, counsel for the Committee, in effect, withdrew this and other accusations that the SEC and its staff were not acting in good faith.

5. In any event, the decision to institute suits such as this is committed by statute to the discretion of the SEC. Section 21(e) of the Securities Exchange Act, 15 U.S.C. 78u(e). Again, as noted in the Court's Memorandum Decision, the record shows SEC brought this action with due regard for the voting rights of stockholders of UIC and in the public interest.

6. The defendants have also stressed that management of UIC from the beginning of its solicitation has stated that the Committee was "fronting" for Gira and Petersen and that, therefore, the stockholders are fully aware of all the facts. Such charges by management are not, however, a substitute for disclosure by the insurgents of the facts which stockholders are entitled to know when they execute proxies for the election of directors. Clearly, management's accusation is no substitute for, nor does it relieve, the insurgents from the duty to make the affirmative disclosures required by the proxy regulations.

III.
CONCLUSIONS OF LAW

1. This Court has jurisdiction of this proceeding under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa.

2. The evidence convincingly establishes that Bernard F. Gira and Herbert J. Petersen have been "participants" in the contest for control of United Indus-

trial Corporation within the meaning of Rule 14a 11(b)(3) of Regulation 14, 17 C.F.R. 240.14a-11(b)(3).[7] The definition encompasses not only the acknowledged members of a committee, but all those who, even indirectly, initiate, direct, finance or otherwise seek to advance the objectives of a committee contending for control of a corporation.

3. The submission by the Committee of a list of nominal members, however distinguished, is all the more misleading when, as here the stockholders whose proxies are solicited, and even the members of the Committee themselves, are shielded from knowledge of the true facts concerning the origin of the Committee, and the extent to which Gira and Petersen instigated and inspired the formation of the Committee and by various means have sought to advance the Committee's objective to obtain control of UIC. While the statement in the Committee's proxy material that "nor are Gira and Petersen members of the Committee" may be correct in a formal sense, in the light of the evidence before the Court, it is clear that the omission to disclose their *de facto* participation constitutes an abuse of the solicitation process, in direct violation of Rule 14a-9 of Regulation 14, 17 C.F.R. 240.14a-9. See *S.E.C. v. May*, 134 F. Supp. 247 (S.D.N.Y., 1955), *affirmed* 229 F. 2d. 124 (C. A. 2, 1956).

4. The SEC is entitled to a decree (1) enjoining the defendants UIC Stockholders' Protective Commit-

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[7]The Rule defines a "participant" to include "any Committee or group which solicits proxies, any member of such Committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly, take the initiative in organizing, directing or financing any such Committee or group."

tee, Stanley E. Henwood, Richard I. Roemer and Lewis M. Poe individually and as members of and proxies for said Committee, and the defendants Bernard F. Gira and Herbert J. Petersen from violations of Section 14(a) of the Act, 15 U.S.C. §78n(a), and Rule 14a-9 of Regulation 14, 17 C.F.R. 240.14a-9 thereunder, in the solicitation of proxies in respect to the common or preferred stock of UIC to be voted at the adjourned annual meeting of stockholders; and (2) invalidating all proxies of stockholders of UIC now held by them; and (3) enjoining them from voting any such proxy which is not received pursuant to a solicitation made subsequent to the entry of the final decree in the action, in accordance with Section 14(a) of the Act, 15 U.S.C. §78n(a), and Regulation 14 thereunder, 17 C.F.R. 240.14.

5. As stated in the Court's Memorandum Decision, it is not the intention of the Court to cause any stockholder of UIC to lose his voting rights. It is within the equitable power of the Court, in enforcing the statutory prohibition against unlawful proxy solicitations, not only to invalidate proxies which have been obtained by means of misleading solicitations, but also to mold its decree to avoid such an eventuality. *SEC v. May*, 134 F. Supp. 247, *supra* and *SEC v. O'Hara Reorganization Committee*, 28 F. Supp. 523 (D. Mass. 1939). See also *SEC v. Trans American*, 163 F. 2d 511, 518 (C. A. 3, 1947), *certiorari denied* 332 U.S. 847.

6. Accordingly, the decree will provide for adjournment of the annual meeting of stockholders of UIC to a date not earlier than November 22, 1961, to allow time for the further solicitation of new proxies (in

accordance with the proxy rules) by management, the Committee, or any other committee, group, or individual, whether favoring or opposing management.

7. For the reason given in the Memorandum Decision, the circumstances do not require that the remaining members of the Committee be enjoined. Accordingly, the action will be dismissed, without prejudice, as to those defendants.

8. The SEC is also entitled to a decree directing the defendants Bernard F. Gira and Herbert J. Petersen to comply with Rule 14a-11 of Regulation 14, 17 C.F.R. 240.14a-11, by filing corrected statements containing the information required by Schedule B, concerning their status as participants in the proxy controversy.

APPENDIX "C."

Index of Exhibits.

Exhibits	Description	Marked for Identification		Admitted in Evidence	
		Date	Page	Date	Page
1	Schedule 14-B of Petersen	7/26–27	94		
2	Diagram of Building			7/26–27 9/21–22	158 2206
3	Invoice of shareholders' list			7/26–27	162
4	Letter of transmittal on shareholders' list			7/26–27	163
5	Emery Freight Bill	7/26–27	167		
6	Receipt executed by Hamner covering stockholder list from Chemical Bank at the foot of letter heretofore received as Exhibit 4. Receipt dated 1-18-61.			8/1	189
7	Work papers of UIC relative to the stockholder list and a report to Ohio			8/1	192
8	Letter to State of Ohio dated 1-26-61			8/1	193
9	Emery Air Freight receipt			8/1	199
10	Certified copy of 14-B of Gira			8/1	201
11	Certified copy of 14-B of Yaras			8/1	202
12	Certified copy of 14-B of Yaras				
13	Copies of mailings #1, #2 and #3			8/1	205
14	Management material	8/1	207	8/1 8/15	207 675
14-A	Definitive interim report to shareholders			8/15	676
15	Preliminary material submitted by the Stockholders' Protective Committee—certified copies	8/1	210	8/22	1016
16	Affidavit of Clerk of Chemical Bank				
17	Letter from Roemer to SEC dated 5-16-61			8/1	267
18	Papers on collateral loan for Yaras, etc.			8/2	391
19	Press release *re* libel suit			8/2	414
20	Letter from Gira to stockholders	8/2	417	8/2	429
21	Cohen letter of July 14			8/3	443

Exhibits	Description	Marked for Identification		Admitted in Evidence	
		Date	Page	Date	Page
22	Affidavit of Gordon	8/3	444		
23	Press release	8/15	633	8/15	63
24	Copy of Wall Street Journal (Jan. 17, 1961)	8/15	633	8/15	63
25	Affidavit of Bud Lewis			8/15	67
26	Roemer letter of 6-13			8/17	94
27	26th annual report of SEC	8/17	951		
28	Transcript of Luther	8/22	1017	9/12	1454
29	Transcript of Williams	8/22	1018	9/12	1454
30	Transcript of Ballance	8/22	1018	9/12	1454
31	Transcript of Wulfekuhler	8/22	1018	9/12	1454
32	Transcript of Lawry	8/22	1019	9/12	1454
33	Transcript of Gira	8/22	1019	9/12	1454
34	Transcript of Petersen	8/22	1019	9/12	1454
35	Transcript of Yaras	8/22	1019	9/12	1454
36	Transcript of McLaughlin	8/22	1020	9/12	1454
37	Transcript of Soderstrom	8/22	1020	9/12	1454
29-A	Transcript of Williams	8/22	1020	9/12	1454
28-A	Transcript of Luther	8/22	1020	9/12	1454
38	Transcript of Henwood	8/22	1021	9/12	1454
39	Transcript of Roemer	8/22	1021	9/12	1454
38-A	Transcript of Henwood	8/22	1021	9/12	1454
39-A	Transcript of Roemer	8/22	1021	9/12	1454
40	Affidavit of Risk	8/23	1132	8/23	1154
41	Affidavit of Cohen	8/23	1133	8/23	1154
42	Order of SEC directing an investigation and designating an officer to take the testimony in matter of UIC	8/23	1162	8/23	1169
43	Statement of assets and disbursements of the Stockholders' Protective Committee			9/12	1414
44	Article from Wall Street Journal			9/12	1415
45	Affidavit of Roy L. Williams			9/12	1424
46	Minutes of meeting of 1-13-61			9/12	1443
47	Testimony of Dumont			9/12	1454
48	Testimony of Hugh E. McColgan			9/12	1454
49	Affidavit of Landau			9/13	1582
50	Deposition of Manuel Cohen			9/21	2207

Exhibits	Description	Marked for Identification		Admitted in Evidence	
		Date	Page	Date	Page
A	Mailing #4			8/2	322
B	Bishop's Report on Fein	8/2	329	8/2	342
C	Order for Xerox machine			8/2	331
D	Letter to SEC from Brandlin dated March 24, 1961			8/2	381
E	Documents in BSF stock purchase 1959	8/2	431	9/22	2279
F	Letter from Cohen			8/16	787
G	Telegram from Cohen	8/17	905	8/17	905
H	Diagram on Board	8/17	972		
I	Letter from Brandlin to Risk, 6-16	8/24	1302	8/24	1303
J	Affidavit of Luther			8/24	1315
K	Transmittal letter of Affidavit			8/25	1331
L	UIC file by reference			8/25	1366
M	Letter from Risk			8/25	1386
N	Deposition of Sharon Clay Risk			9/14	1655
O	Weinman	9/15	1847	9/15	1883
P	Documents consisting of five sheets	9/15	1883	9/22	2279
Q	Pencil notes of November 12, 1961			9/19	1937
R	Press release			9/22	2279
S	Notes of Commission staff that were to be marked during Risk deposition	9/22	2280	9/22	2280
AA	Releases in newspaper	8/3	482	8/3	488
BB	Releases in newspaper	8/3	482	8/3	488
CC	Releases in newspaper	8/3	482	8/3	488
DD	Releases in newspaper	8/3	482	8/3	488
EE	Kendrick's sec'y letter to SEC	8/3	513	8/3	514
FF	Letter from Kendrick to Cohen 7/18	8/3	513	9/22	2282
GG	Unedited material of management	8/3	543	9/22	2281
HH	Article about libel suit from the 7/13 edition of the Los Angeles examiner	9/19	1949	9/22	2281
II	Affidavit of Petersen				
JJ	Affidavit of Gira				
KK	Copy of libel complaint			9/20	2100

Exhibits	Description	Marked for Identification		Admitted in Evidence	
		Date	Page	Date	Page
LL	Financial reports	9/21	2111	9/21	2178
MM	Proxy statement mailed to the shareholders of Topp Industries Corporation	9/21	2111		
NN	Monthly report (financial statement)	9/21	2111		
AAA	Correction letter from Yaras	8/17	975	8/22	1011
BBB	Intercompany correspondence of	9/14	1738	9/14	1739
CCC	NIC from Gira to M. Bonner received on or about 9/19/60 concerning Permachem Corp.	9/14	1738	9/14	1739
DDD	Press release	9/14	1764		